THE GREY AREA

Concordia UNIVERSITY

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Editor's Note

The Office of the Legal Counsel appreciated the kind and favourable comments we received about the first publication of the *Higher Education Brief*. We are pleased with the reception given to this pamphlet.

This issue of *The Grey Area* deals with human rights and freedoms. The Québec *Charter of Human Rights and Freedoms* was adopted in 1975 and the *Canadian Charter of Rights and Freedoms* was adopted and enshrined in the Constitution of Canada in 1982.

These legal instruments gave rise to an abundant case-law and their interpretation and application remains a challenge to the courts due to the fundamental issues they address.

We will attempt to explain the contents and application of the Charters, notably through case-law and questions and answers.

I would like to acknowledge the contribution of Bram Freedman, who has recently joined the University as Assistant Legal Counsel.

Michèle Gamache
Legal Counsel

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Definition of Discrimination

According to the Supreme Court of Canada, discrimination may be defined as:

> "[...] a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society."

Human rights and freedoms are matters governed by public law, which notably regulates the relationship between individuals and government.

These rights and freedoms are enshrined in the Constitution of Canada or guaranteed by provincial Charters of Human Rights and Freedoms. They are, therefore, regulated by both branches of public law, constitutional law and administrative law.

The following is an analysis of the legal framework of these rights and freedoms.

Canadian Charter of Rights and Freedoms

In 1982, the *Constitution Act, 1867*, originally called the *British North America Act*, was modified to include this Charter. The Charter applies to the actions of the legislative, executive and administrative branches of provincial and federal governments. The Québec Charter, or any provincial law, is subject to the Canadian Charter's scrutiny and may be challenged in court as permitting a discrimination that the Canadian Charter prohibits.

Québec Charter of Human Rights and Freedoms

This Charter covers all matters under the legislative jurisdiction of Québec and all Québec laws are subject to its authority. While the Canadian Charter does not apply to purely private matters without any connection to government, the Québec Charter applies to all activities, public or private. Thus, it prohibits discriminatory provisions in contracts as enumerated under the Charter.

An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information

This Act confirms the right of a person with respect to his or her private life. The Act notably ensures that nominative information, such as student records and personnel files, will not be disclosed without the consent of the person(s) involved.

An Act to Secure the Handicapped in the Exercise of their Rights

This Act allows a disabled person to obtain a service program to facilitate his or her educational, vocational and social integration. However, the Act does not impose on public or quasi-public bodies the obligation to implement a service program.

Occupational Health and Safety Act

This Act regulates the right of a person to fair and reasonable conditions of employment which have proper regard for his or her health, safety and physical well-being. It aims at eliminating, at the source, all dangers to health, safety and physical well-being. It sets out employer-employee rights and obligations and establishes mechanisms to ensure employees' participation in decisions affecting their health and safety.

UNIVERSITY POLICIES

Committed to the respect of human rights and freedoms, the University has adopted policies to ensure such respect, including:

- Code of Conduct (Non-Academic)
- Guidelines for HIV/Aids-Related Concerns
- Distribution of Publications
- Posters
- Sexual Harassment Policy

These policies, contained in Manual C of Concordia University Policies and Procedures, are available upon request. The University Secretariat is responsible for the distribution, revision and updating of policies. Requests may be directed to Marie-Andrée Robitaille, Assistant to the Secretary-General, at 4811.

Québec *Charter of Human Rights and Freedoms*

Article 10. "Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age, except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right."

Canadian Charter of Rights & Freedoms

Article 15(1). "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

QUESTIONS & ANSWERS

Q: What is the *Canadian Charter of Rights and Freedoms*?

A: The Canadian Charter is a constitutional instrument. It is part of the *Constitution Act, 1982*, which modified the Constitution of Canada, i.e., the *Constitution Act, 1867 (commonly known as the BNA Act)*.

Q: Who is bound by the Canadian Charter?

A: The Canadian Charter applies to the actions of the legislative, executive and administrative branches of provincial and federal governments. It does not apply to purely private litigation which has no connection with government.

Q: Does the Canadian Charter apply to universities?

A: Recently, the Supreme Court of Canada ruled that universities are not part of the government and therefore are not subject to the Canadian Charter. However, any Québec law which regulates the activities of Québec universities is subject to the Canadian Charter.

Q: What are the equality rights guaranteed by the Canadian Charter?

A: Article 15, paragraph 1, of the Charter provides for a plurality of rights to equality. It guarantees to individuals the right to equality before the law; the right to equality under the law; the right to the equal protection of the law; and the right to the equal benefit of the law. These rights shall be provided without discrimination.

Q:What does the "right to equality *before* the law" mean?

A: It means that every person, whatever his or her condition, is subject to the law and that the same law shall be applied to the person in an impartial manner.

Q: What does the "right to equality *under* the law" mean?

A: It means that the substance of the law, and not only its application, shall be compatible with the concept of equality.

Q: What does the "right to the equal protection of the law" mean?

A: It means that the law, in its substance and application, shall be free from all forms of discrimination.

Q: What does the "right to equal benefit of the law" mean?

A: It means that the condition of eligibility for the receipt of benefits provided by the law must be in conformity with the concept of equality.

Q:What are the grounds for discrimination which result in a denial of equality?

A: In particular, discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental disability would result in such a denial. However, the list of grounds is not limited. Additional grounds such as marital status or sexual orientation may be considered to fall within the ambit of Article 15, paragraph 1.

Q: What is the Québec Charter of Human Rights and Freedoms?

A: The Québec Charter is an ordinary statute and not a constitutional instrument, even though it is often qualified as being quasi-constitutional.

Q: Who is bound by the Québec Charter?

A: The Québec Charter covers all matters that come under the legislative jurisdiction of Québec. It applies to the University's Charter and its by-laws. All Québec laws are subject to its authority and regulations. It governs private as well as public litigation.

Q: Do the Canadian and Québec Charters guarantee the same rights and freedoms?

A: Mostly the same. But, considering the broader application of the Canadian Charter and its constitutional character, it guarantees other rights such as linguistic and aboriginal rights as well as freedom of movement of goods and persons.

Q: Are the types of discrimination prohibited by the Québec and Canadian Charters the same?

A: The difference is that the list of discriminations prohibited in the Québec Charter is exhaustive while the one contained in the Canadian Charter is not limited.

CASE-LAW

The right of a student to be represented by an attorney before a disciplinary committee

Bijan Ahvazi was a Concordia student who was accused of cheating at an examination on October 25, 1985. A *Hearing Committee* was convened and it recommended expulsion. Mr. Ahvazi lodged an appeal with the *Senate Appeals Committee on Academic Misconduct* and insisted on being assisted by a member of the Québec Bar. The Committee refused the request, based on University regulations which state that a student may be accompanied by an advisor from within the University. Mr. Ahvazi presented a motion for *mandamus* to the Québec Superior Court in order to force the committee to allow him to be assisted by a lawyer. He relied on Article 34 of the Québec *Charter of Human Rights and Freedoms* which guarantees the right to be represented by an attorney before any "tribunal."

Madame Justice Mailhot of the Québec Superior Court rejected the motion for *mandamus* on November 28, 1986. She based her decision on the definition of "tribunal" contained in Article 56.1 of the Québec Charter, which holds that a tribunal is an organism that exercises judicial or quasi-judicial functions. The Court ruled that the committee was not a quasi-judicial tribunal. First, it was not created by statute nor imposed by law, and secondly, in its opinion, it did not exercise judicial or quasi-judicial functions. However, as an administrative body, the committee was subject to the duty to act fairly. This less onerous duty arises from the same general principles of natural justice as does the duty to act judicially which applies to judicial or quasi-judicial bodies.

However, this duty does not *necessarily* include the obligation to allow legal representation before a decision-making body. The tribunal reaffirmed the traditional hesitation of the courts to intervene in university affairs and recognized that universities are masters of their own procedures and, therefore, can at their discretion allow for legal representation or not. As well, only a particularly grave context would justify the intervention of a court.

The Québec Court of Appeal confirmed the Superior Court decision on May 8, 1992. Mr. Justice Beauregard, writing for himself and Justices McCarthy and Proulx, agreed that Mr. Ahvazi's request was unfounded. Justice Beauregard agreed with the Superior Court and held that the Senate committee was not a tribunal in the legal sense but was actually a "domestic" tribunal which would fall outside the ambit of Article 34 of the Québec *Charter.* Nonetheless, the procedures before it must respect the duty to act fairly. The right to legal representation, however, is not a necessary corollary of the application of this duty. Taking into account all of the circumstances, Justice Beauregard held that the refusal to allow legal representation did not cause an injustice requiring the supervisory control of the Court.

The plaintiff has until September 8th to request from the Supreme Court of Canada the permission to lodge an appeal.

(Case discussed: *Ahvazi v. Concordia University*, J.E. 87-1001 (C.S.); C.A. Montréal, n° 500-09-00156-868, May 8 1992, J.J. Beauregard, McCarthy and Proulx.)

Specific rights guaranteed by the Canadian Charter

- Freedom of movement
- Freedom of establishment
- French & English as the official languages of Canada
- French & English as the official languages of New Brunswick
- Right of a child to education in the language in which his of her parents were educated
- Aboriginal rights with respect to ancestral rights

QUÉBEC CHARTER OF HUMAN RIGHTS AND FREEDOMS

Rights and Freedoms Guaranteed:

Fundamental Rights and Freedoms

- Right of a person to life, to personal security, inviolability and freedom
- Right to assistance when one's life is in peril
- Fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association
- Right of a person to the safeguard of his or her dignity, honour and reputation
- Right of a person to his or her private life
- Right of a person to the peaceful enjoyment and free disposition of his or her property, except to the extent provided by law
- A person's home is inviolable
- Right of a person to the respect of his or her private property
- Right of a person to non-disclosure of confidential information

Right to equal recognition and exercise of rights and freedoms without distinction, exclusion or preference based on discrimination

Are prohibited:

- Discrimination on the basis of race, colour, sex, pregnancy, sexual orientation, civil status, age, religion, political convictions, language, ethnic or national origin, social condition or handicap
- Discriminatory notice, symbol or sign
- Discrimination in goods or services ordinarily offered to the public
- Discriminatory provisions in a contract
- Discrimination in access to public transportation or public places
- Discrimination in employment, practiced by associations or professional corporations; by an employment bureau; in an employment application form or employment interview
- Discrimination on the basis of having a criminal record
- Discrimination in salary and working conditions

Political Rights

- Right of petition to the National Assembly for the redress of grievances
- Right of a person to be a candidate and to vote in an election

QUÉBEC CHARTER OF HUMAN RIGHTS AND FREEDOMS

Judicial Rights

- Right of a person to an impartial hearing before an independent and impartial tribunal, for the determination of his or her rights and obligations
- Right of a person to non-deprivation of liberty except on grounds provided by law
- Right of a person against unreasonable search or seizure
- Right of a person to respectful treatment if arrested or detained
- Right of a detained person to separate treatment on the basis of sex, age and physical or mental condition
- Right of a person to be kept apart from persons serving sentence, while awaiting the outcome of his or her trial
- Right of a person, arrested or detained, to be promptly informed, in a language he or she understands, of the grounds of the arrest or detention
- Right of a person to the assistance of a lawyer
- Right of a person to be brought promptly before a competent tribunal and to be released on an undertaking
- Right of a person to be tried within a reasonable time; to be presumed innocent until proven guilty; and not to be compelled to testify against himself or herself; right to be represented by a lawyer or to be assisted by one
- Right of a person to be assisted by an interpreter
- A person cannot be held guilty for an act which, when committed, did not constitute a violation of the law
- A person cannot be tried again for an offence for which he or she was acquitted
- If the punishment of an offence varied between the time of its commission and the time of sentence, an accused person has a right to the lesser punishment
- Right against self-incrimination, except for perjury or for the giving of contradictory evidence

Economic and Social Rights

- Every child has a right to the protection, security and attention that his or her parents or the persons acting in their stead are capable of providing
- Right of a person to free public education, as provided by law
- Right of parents or persons acting in their stead to require for their children a religious or moral education in conformity with their convictions, within the framework of the curricula provided by law
- Right of parents or persons acting in their stead to choose a private educational establishment for their children
- Right of persons belonging to ethnic minorities to maintain and develop their own cultural interests
- Right of a person to information
- Right of a person to financial assistance and social measures provided by law
- Right of a person to fair and reasonable conditions of employment which have proper regard for his or her health, safety and physical well-being
- Equal rights of spouses
- Right of elderly or handicapped person to protection against any form of exploitation.

Did you know that...

An athletic activity restricted to persons of the same sex is unconstitutional.

In 1988, the Court of Appeal of Ontario ruled that the provision of the *Ontario Human Rights Code* which stipulated, as non-discriminatory on the grounds of sex, an athletic activity restricted to persons of the same sex, was contrary to Article 15, paragraph 1, of the Canadian Charter, which prohibits discrimination on the basis of sex. The tribunal found that the provision of the Ontario Charter did not constitute reasonable limits on equality rights which have been "demonstrably justified in a free and democratic society."

(Case discussed: *Blainey v. Ontario Hockey Association*, (1988) 9 C.H.R.R. 4549.)

A penitentiary private visit program restricted to heterosexual couples has been found unconstitutional.

In 1988, the Federal Court of Canada ruled that a program, which provided inmates of federal penitentiaries with the privilege of private visits but did not extend to *common law* spouses of the same sex, contravened Article 15, paragraph 1, of the Canadian Charter, as constituting a discrimination on the grounds of sexual orientation.

After deciding that the right of the appellant in this case had been violated, the Court decided that this denial did not constitute reasonable limits of a right which could be "demonstrably justified in a free and democratic society."

The Court reached the conclusion that the preparation of inmates for their return to life in the community was not, as a desirable goal, furthered by denying the applicant access to his most supportive relationship nor was there a proportionality between the right affected and the degree to which the limitation furthers a desirable goal.

(Case discussed: *Versey v. Commissioner of Correctional Services of Canada*, F.C. Dubé, J., November 3, 1989.)

Hate propaganda has been found to be outside the realm of protected expression under the Canadian Charter.

An Alberta teacher, charged under the hate propaganda provisions of the *Criminal Code*, was found guilty for having promoted hatred against Jews because of the style and contents of his high school history class. He challenged the constitutionality of the provisions, alleging that they constituted a violation of his right to freedom of expression guaranteed by the Canadian Charter.

The Supreme Court of Alberta ruled that the words "freedom of expression" do not mean an absolute freedom permitting an unabridged right of speech or expression.

The Court held that the hate propaganda provisions of the *Criminal Code* could not be considered an infringement which limits "freedom of expression" but "on the contrary is a safeguard which promotes it."

(Case discussed: *In R v. Keegstra*, (1984) 19 C.C.C. (3d) 254 (Alta. Q.B).)

The Proportionality Test

Article 1 of the Canadian Charter states:

> "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

If a tribunal reaches the conclusion that a law or some of its provisions do not constitute reasonable limits demonstrably justified in a free and democratic society, they are unconstitutional and, therefore, null and void.

The test developed by the Supreme Court of Canada to decide if the denial of a right or freedom is constitutional may be described as follows:

1. The limitation shall represent a legitimate exercise of legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights or freedoms.

2. There shall be a proportionality between the right affected and the degree to which the limitation furthers a desirable goal.

Editor: Michèle Gamache
Production Assistant: A. Kavanagh
Research Assistant: B. Freedman
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Published by:

THE LEGAL COUNSEL OFFICE
Mailing Address:
1455 de Maisonneuve West, BC 123
Montréal, Québec H3G 1M8
Location: 1463 Bishop St.
Telephone: (514) 848-4854
Fax Number: (514) 848-8655

This Bulletin has been prepared for purposes of general information only. It must in no case be considered as a comprehensive study of the law nor an expression of opinion upon the matters reviewed in it. It would be advisable to consult with the Legal Counsel with respect to any question(s) concerning one's individual circumstances.

NEXT ISSUE: *Contracts*

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